IT 08-4
Tax Type: Income Tax
Issue: Statute of Limitations Application

STATE OF ILLINOIS
ILLINOIS DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 07-IT-0000**
	FEIN 00-0000000
v.	**Tax Year 2000**
ABC, INC.,	**Ted Sherrod**
Taxpayer	**Administrative Law Judge**

ORDER PURSUANT TO DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

PREFACE:

This matter comes on to be heard upon a Motion for Summary Judgment ("Motion") filed by the Illinois Department of Revenue ("Department"). The matter at issue concerns the Department's denial of the taxpayer's claim for refund for the tax year 2000 by reason of the taxpayer's purported failure to file this claim for refund within the statutory limitations period. The Department has submitted documentation in support of its Motion, and the taxpayer has submitted affidavits and documents opposing the Motion. Following an examination of the documents submitted in this cause, this matter is concluded in favor of the Department. In support of this determination, I make the following findings of fact and conclusions of law.

Findings of Fact:

1. On March 15, 2001, ABC, Inc. ("taxpayer") filed a request for extension of the due date for filing its income tax return for the 2000 tax year to October 2001 and paid $18,000 toward its tax liability for the 2000 tax year. Department's Motion for Summary Judgment ("Motion") ¶¶ 3, 4.
2. The Department's records do not indicate any filing of the taxpayer's 2000 return prior to August 23, 2005. Motion ¶¶ 5, 9, 15; Motion Exhibit ("Ex.") 3, 4.
3. Taxpayer filed an IL-1120-ST for the 2000 tax year on August 23, 2005. This return requested a refund or tax credit for overpayment of tax based upon the taxpayer's $18,000 payment at the time of its request for extension filed March 15, 2001. Motion ¶¶ 5, 15; Motion Ex. 3.
4. In response to the taxpayer's IL-1120-ST for the 2000 tax year requesting a refund or credit for overpayment of tax, the Department sent to the taxpayer an LTR-351, Error Notice Response, on August 25, 2006 notifying the taxpayer that its tax year 2000 tax return (Motion Ex. 3) was filed more than three years beyond the due date and therefore, pursuant to section 911(f) of the Illinois Income Tax Act, 35 **ILCS** 5/911(f), the Department was prohibited from issuing a refund or credit pursuant to the taxpayer's request. Motion Ex. 4.
5. On November 10, 2006, the taxpayer filed an IL-843, Amended Return or Notice of Change in Income ("IL-843"), for its 2000 tax year seeking a refund of a tax overpayment in the amount of $14,873. Motion ¶¶ 2, 7, 10; Motion Ex. 5.

6. On January 25, 2007, the Department issued to the taxpayer an LTR -353, Notice of Claim Status, stating that the taxpayer's refund claim (IL-843) dated November 9, 2006 had been denied. Motion Ex. 2.

Conclusions of Law:

On August 23, 2005, the taxpayer filed an IL-1120-ST showing a refund due on its overpayment of income tax for FYE 12/31/00 resulting from a payment included with its request for extension that exceeded the amount of tax due for that year. Motion Ex. 3. Subsequently, on November 10, 2006, the taxpayer filed an IL-843 for its 2000 tax year. Motion ¶¶ 2, 7, 10; Motion Ex. 5. The Department issued an LTR-353, Notice of Claim Status ("LTR-353"), denying this claim for refund on January 25, 2007 asserting that the taxpayer failed to file it within three years following the extended due date of its return as required by section 911(f) of the Illinois Income Tax Act, 35 **ILCS** 5/911(f). Motion Ex. 2. At issue in this case is whether the taxpayer's refund claim should be granted.

Section 911(f) of the Illinois Income Tax Act, 35 **ILCS** 5/911(f), in effect for the tax year 2000, provided as follows:

> No claim for refund based on the taxpayer's taking a credit for estimated tax payments as provided by Section 601(b)(2) or for any amount paid by the taxpayer pursuant to Section 602(a) or for any amount of credit for tax withheld pursuant to Section 701 may be filed more than 3 years after the due date, as provided by Section 505, of the return which was required to be filed relative to the taxable year for which the payments were made or for which the tax was withheld. The changes in this subsection (f) made by this amendatory Act of 1987 shall apply to all taxable years ending on or after December 31, 1969.
> 35 **ILCS** 5/911(f)

Section 602(a) of the Illinois Income Tax Act, 35 **ILCS** 5/602(a) provides as follows:

> (a) In general. Pursuant to Section 505, the Department may promulgate regulations to provide automatic extensions of the time for

> filing a return. In connection with any other extension provided under Section 505 of the time for filing a return, the taxpayer shall file a tentative tax return and pay, on or before the date prescribed by law for the filing of such return (determined without regard to any extensions of time for such filing), the amount properly estimated as his tax for the taxable year.
> 35 **ILCS** 5/602(a)

Section 505(a)(1) of the Illinois Income Tax Act, 35 **ILCS** 5/505(a)(1), provides as follows:

> (1) Corporations. Except as provided in paragraph (3), corporate returns shall be filed on or before the 15th day of the third month following the close of the taxable year, unless, subject to the provisions of Section 602, the Director grants an extension or extensions of time (not to exceed 6 months in the aggregate) for such filing, or unless the income or loss of a taxpayer is reported for federal purposes on a return with a due date later than the 15th day of the third month following the close of the taxable year, in which case the same due date shall apply to the corresponding Illinois return.
> 35 **ILCS** 5/505(a)

Both the Department and the taxpayer agree that the taxpayer paid $18,000, its estimated tax for 2000, on March 15, 2001, pursuant to section 602(a) of the Illinois Income Tax Act, in connection with its request for an extension of the return due date for its 2000 Illinois income tax return. Motion ¶¶ 3, 4; Taxpayer's Response to Department of Revenue's Motion for Summary Judgment ("Taxpayer's Response") p. 1. The Department of Revenue avers that it has no record of any request for a refund of this amount prior to August 23, 2005, the date on which the taxpayer filed an IL-1120-ST for 2000 showing a tax overpayment. Motion ¶¶ 5, 9, 15; Motion Ex. 3, 4. This averment is supported by the Department's submission under the Certificate of the Director of Revenue of all taxpayer filings in its records pertaining to the taxpayer's 2000 income tax none of which show that the taxpayer filed its 2000 tax return by the extended due date.

Documentation submitted by the Department in support of its Motion further

indicates that the taxpayer filed on November 10, 2006, an IL-843 for 2000 seeking a refund of tax overpayment for that year. Motion ¶¶ 2, 7, 10; Motion Ex. 5. The foregoing supports a determination that the taxpayer's return for 2000 and its refund claim for that year were filed more than three years after the due date of the taxpayer's 2000 return. Accordingly, based upon averments and supporting documentation contained in the record, the taxpayer's refund rights are governed by section 911(f) of the Illinois Income Tax Act which expressly prohibits refunds of estimated taxes, paid with requests for extensions, where claims for such refunds are filed more than three years after the due date of the return for the year for which estimated taxes were paid. Applying the plain language of 35 **ILCS** 5/911(f) to the facts established in the Motion section 911(f) plainly bars the taxpayer's claim for refund.

The taxpayer does not dispute, or even mention, the applicability of section 911(f), but instead seeks to rely upon the statute of limitations for refunds prescribed by section 911(a) of the Illinois Income Tax Act, 35 **ILCS** 5/911(a), (Taxpayer's Response pp. 4, 5) which provides as follows:

> In general. Except as otherwise provided in this Act:
> (1) A claim for refund shall be filed not later than 3 years after the date the return was filed (in the case of returns required under Article 7 of this act respecting any amounts withheld as tax, not later than 3 years after the 15th day of the 4th month following the close of the calendar year in which such withholding was made), or one year after the date the tax was paid, whichever is the later; and
> (2) No credit or refund shall be allowed or made with respect to the year for which the claim was filed unless such claim is filed within such period.
> 35 **ILCS** 5/911(a)

Section 911(d) of the Illinois Income Tax Act, 35 **ILCS** 5/911(d), limits the amount of any refund recoverable pursuant to section 911(a) noted above, providing as follows:

> Limit on amount of credit or refund.
> (1) Limit where claim filed within 3-year period. If the claim was filed by the claimant during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.
>
> (2) Limit where claim not filed within 3-year period. If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the one year immediately preceding the filing of the claim.
> 35 **ILCS** 5/911(d)

Pursuant to section 911(d)(1), any refund recoverable where a refund claim is filed pursuant to section 911(a) is limited to the amount paid for the period to which the refund claim pertains within three years of the due date of the return for that period. Pursuant to section 911(d)(2), where a refund claim is not filed within three years of the due date of the return, any refund recoverable is limited to the amount paid within one year of the filing of the refund claim. The taxpayer's tax return for 2000 was due on October 15, 2001, the extended due date for this return based upon the taxpayer's request on March 15, 2001 for an extension of the due date for this return. Motion ¶¶ 3, 9. The taxpayer did not file its 2000 return prior to October 15, 2001 or within the three years following that date. Motion ¶¶ 5, 9, 15. The Department further avers that the taxpayer paid its estimated tax for 2000 on March 15, 2001, filed an original IL-1120-ST showing an overpayment of its 2000 taxes on August 23, 2005 and filed a claim for refund (IL-843) on November 10, 2006. Motion ¶¶ 4, 10. Consequently, it contends, both of these returns were filed more than three years from the return due date of October 15, 2001 and more than one year following the payment of tax for 2000 in the amount of $18,000 on

March 15, 2001. Therefore the taxpayer's tax overpayment was not refundable by virtue of the limitations contained at section 911(d)(1) and (d)(2). Motion ¶¶ 8-15.

A motion for summary judgment is appropriate where the pleadings, affidavits and depositions on file, when viewed in a light most favorable to the non-moving party, show no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Busch v. Graphic Color Corp., 169 Ill. 2d 325 (1996). Summary judgment is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt. Purtill v. Hess, 111 Ill. 2d 229 (1986). In determining the existence of a genuine issue of material fact the court must consider the pleadings, depositions, admissions, exhibits, and affidavits on file and they must be strictly construed against the movant and in favor of the non-movant. *Id.* If the movant supplies facts which, if not contradicted, would entitle the movant to judgment as a matter of law, the opposing party cannot rely on its pleadings alone to raise issues of material fact. *Id.* Therefore, facts contained in documentation in support of a motion for summary judgment which are not contradicted by affidavit are admitted and must be taken as true for purposes of the summary judgment motion. *Id.*

Despite the obvious legal conclusions arising from the uncontradicted averments contained in the Department's Motion and documentation submitted in support thereof, the taxpayer contends that a disposition of this matter pursuant to the Department's Motion for Summary Judgment is improper. Taxpayer's Response pp. 4-7; ABC, Inc. Supplemental Response to Department of Revenue's Motion for Summary Judgment ("Taxpayer's Supplemental Response") pp. 5, 6. Specifically, the taxpayer claims that it timely filed its return for 2000 prior to the extended due date for this return (October 15,

2001) and that, as a consequence, the credit for tax overpayment shown on its return (Motion Ex. 3) constituted a request for refund that was not subject to the limitation set forth in section 911(d)(2). Taxpayer's Response pp. 1 – 5.[1] In support of this contention, the taxpayer presents the following arguments.

The taxpayer contends that proof that its 2000 return was timely filed may be inferred from the fact that the taxpayer took a credit for its tax overpayment in 2000 on its 2001, 2002 and 2003 returns based upon a carryforward of its credit to these years and from the Department's failure to notify it that these carryforwards were erroneous. Taxpayer's Response pp. 4-7.[2] It also seeks to rely upon the affidavit of John Doe who avers that the taxpayer's 2000 return was executed and delivered to the taxpayer's accountant. Taxpayer's Response Ex. A.

The Illinois Code of Civil Procedure ("CCP"), at section 2-1005 (735 **ILCS** 5/2-1005) provides as follows:

> Summary judgments. (a) For plaintiff. Any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.
> (b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.
> (c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions

[1] The taxpayer contends that its timely filed return was identical to its return filed August 23, 2005 included in the record as Motion Ex. 3. Taxpayer's Response p. 2. However the taxpayer has not submitted a copy of the taxpayer's return for 2000 dated on or before the due date for this return (October 15, 2001).

[2] The taxpayer further avers that the Department was obligated to notify the taxpayer that its tax return for 2000 had not been received. The taxpayer's argument is baseless. The rights of taxpayers under Illinois law, including when the Department is obligated to notify the taxpayer in proceedings against it, are codified at 20 **ILCS** 2520/1 through 20 **ILCS** 2520/7. Nowhere in any of these provisions is the taxpayer afforded a right to be notified that the Department has not received its tax return. Nor is any such notification mandated by the Illinois Income Tax Act.

> on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
> 735 **ILCS** 5/2-1005

Pursuant to the foregoing provision, a party is entitled to summary judgment when there is no genuine factual dispute. Thus, a non-movant can defeat a summary judgment motion by demonstrating the existence of a genuine issue of material fact. Heller v. Sullivan, 57 Ill. App. 3d 190 (1st Dist. 1978); Dakovitz v. Arrow Road Construction Co., 26 Ill. App. 3d 56 (2d Dist. 1975); Leon v. Max E. Miller & Son, Inc., 23 Ill. App. 3d 694 (1st Dist. 1974). However, a genuine issue of fact is not created merely by claiming that one exits. LaFond v. Pickus, 63 Ill. App. 3d 785 (2d Dist.1978); Peltz v. Chicago Transit Authority, 31 Ill. App. 3d 948 (1st Dist. 1975); Opalka v. Yellen, 31 Ill. App. 3d 359 (1st Dist. 1975); Anderson "Safeway" Guard Rail Corp. v. Champaign Asphalt Co., 131 Ill. App. 2d 924 (4th Dist. 1971); Anderson v. Panozzo, 71 Ill. App. 3d 19 (3d Dist. 1979). The courts have held that a genuine issue of material fact exits only when the facts alleged by the non-movant's averments demonstrate the existence of evidence that supports the position asserted by the non-moving party. Ralston v. Casanova, 129 Ill. App. 3d 1050, 1058 (1st Dist. 1984) ("[Motions for Summary Judgment] must be based on facts, as proven by admissions or by sworn and competent witnesses whose testimony has been reduced to writing. Consideration of such motions are preliminary inquiries to determine whether there is a genuine issue of material fact which must be determined by the factfinder. … 'Genuine' is construed to mean that there is evidence to support the position of the non-moving party."); Carruthers v. B.C. Christopher & Co., 57 Ill. 2d 376

(1974). Given the foregoing, the question presented is whether the averments contained in the taxpayer's reply present a genuine issue of material fact by indicating that there is evidence to support the taxpayer's claim that its 2000 return was timely filed.

The Department has submitted its LTR-351, Error Notice Response ("LTR-351"), denying the taxpayer's refund shown on the taxpayer's 2000 return, and the Department's LTR-353, denying the taxpayer's refund claim under the certificate of the Director of Revenue. Motion Ex. 1, 2, 4. By introducing the LTR-351 and LTR-353 into evidence, its *prima facie* case is established. 35 **ILCS** 5/904(a). Once the *prima facie* case has been established, the burden of proof is on the taxpayer to disprove the necessary elements. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 295 (1st Dist. 1981). In order to overcome the Department's *prima facie* case, the taxpayer must present more than its uncorroborated testimony denying the Department's determination. Jefferson Ice Co. v. Johnson, 139 Ill. App. 3d 626, 633 (1st Dist. 1985); Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217 (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833-34 (1st Dist. 1988); Masini v. Department of Revenue, 60 Ill. App. 3d 11, 15 (1st Dist. 1978); Copelivitz v. Department of Revenue, 41 Ill. 2d 154, 156-57 (1968). Rather, the taxpayer must rebut the Department's *prima facie* case by producing testimony and corroborating books, records and other similar documentary evidence. Mel-Park Drugs, *supra*; PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 34 (1st Dist. 2002).

The taxpayer has relied upon the affidavit of John Doe, the taxpayer's president, to prove that its 2000 return was timely filed. See Taxpayer's Response pp. 4-7. Doe's affidavit is supported by accompanying written statements effectively stating that these

returns were timely filed in the form of credits claimed to be attributable to the timely filed 2000 return taken on the taxpayer's subsequent returns. Taxpayer's Response Ex. A, 1-4. Three of the four accompanying written statements, which are the taxpayer's purported returns for 2002, 2003 and 2004, are unsigned. Moreover, the taxpayer has not submitted a copy of the 2000 tax return that it purports to have timely filed dated on or before October 15, 2001, the extended due date of this return.

The affidavit of John Doe which the taxpayer contends shows that the taxpayer's return for 2000 was timely filed states as follows:

> I, John Doe, being duly sworn on oath, state as follows …
>
> 4. On March 15, 2001, [the taxpayer] filed its request for an extension and paid $18,000.00 towards its 2000 income tax liability (Illinois Department of Revenue's Motion for Summary Judgment, ¶¶ 3, 4).
> 5. In September, 2001, Smith Jones advised me that the 2000 tax return was ready for signature and I went to their offices to sign the return. I signed the original of the return prior to the due date for filing and left the original with Smith Jones to mail. The reason for having the accounting firm mail the return was because I considered the return confidential and did not want to have any aspect of the return or the process in returning the 2000 tax return handled by anyone at the corporate offices. I was advised by Smith Jones that they would file the return.
> 6. The 2000 tax return shows a refund of $14,873.00 which was to be credited against 2001 taxes (Dept. Exhibit 5).

Affiants providing affidavits in support of motions for summary judgment can only attest to facts within their personal knowledge. ILCS S. Ct. Rule §191(a); LaMonte v. City of Belleville, 41 Ill. App. 3d 697 (5th Dist. 1976); Joseph W. O'Brien Co. v. Highland Lake Construction Co., 9 Ill. App. 3d 408 (1st Dist. 1972); Saghin v. Romash, 122 Ill. App. 2d 473 (2nd Dist. 1970); In Re Boysen's Estate, 73 Ill. App. 2d 197 (2nd

Dist. 1966); Department of Law Enforcement v. Willis, 61 Ill. App. 3d 495 (5th Dist. 1978); Burks Drywall, Inc. v. Washington Bank and Trust Co., 110 Ill. App. 3d 569 (2nd Dist. 1982). Doe is not competent to give such testimony concerning whether the taxpayer's tax return for 2000 was filed in this case since he admits in his affidavit that the 2000 return was actually to be mailed by his accounting firm. Consequently, Doe has no personal knowledge regarding whether the 2000 return was actually mailed.

Moreover, the taxpayer has failed to produce any books, records or other similar documentary evidence to corroborate his averments that the return was mailed such as certificates of mailing, mailing records of the taxpayer's accountant or other documentary evidence that these returns were timely mailed. Accordingly, the evidence the taxpayer seeks to rely upon as a basis for a finding that a genuine issue of material fact is presented in this case is legally insufficient to rebut the Department's *prima facie* case created by the LTR-351 and LTR-353 the Department has issued. Mel-Park Drugs, *supra*; PPG Industries, *supra.*

Since Doe is incompetent to testify regarding whether the taxpayer's return was filed and the taxpayer has presented no books or records to show that this return was filed, the taxpayer has presented no evidence to support its claim that the return for 2000 was timely filed. Because a showing of a genuine issue of material fact requires a showing of "evidence to support the position" asserted by the nonmoving party (Ralston, *supra* at 1058), the taxpayer has failed to show that a genuine issue of material fact regarding the timely filing of the taxpayer's 2000 return is presented in this case. Consequently, the taxpayer's averments and affidavits do not give rise to a genuine issue of material fact as required by section 2-1005 of the CCP. Ralston, *supra*; Carruthers,

supra. For this reason, I find that the taxpayer's submissions are insufficient to preclude summary judgment in favor of the Department based upon the Department's averments that the taxpayer's 2000 return was not timely filed as set forth in its motion. *Id.*

The taxpayer also argues that a genuine issue of material fact precluding summary judgment is created by evidence that it paid an additional $25,000 of tax on March 23, 2006. Taxpayer's Supplemental Response pp. 1-6; Doe Affidavit ¶¶ 16, 17; Taxpayer's Supplemental Response Ex. 1B. It contends that this tax payment is attributable to its income tax liability for the 2000 tax year and, therefore, section 911(d) of the Illinois Income Tax Act does not preclude a refund on its claim (IL-843) filed on November 10, 2006, within one year of this payment. *Id.* This averment is based upon the affidavit of John Doe, the taxpayer's President, in which he states the following:

> 16. In February, 2006, I received a communication from the Department of Revenue demanding payment of $24,382.00. This represented the amount the Department claimed was still due for 2000, plus interest and penalties. (Ex. 5)
> 17. Even though ABC disputed the amount that was claimed, it issued a check for $25,000 in order to avoid any further assessment of interest or penalties and to avoid further dispute. Since ABC had paid $18,000.00 in March 2001 for 2000 taxes, and since ABC was entitled to a refund, or credit for 2000 taxes, I assumed that the dispute could be subsequently resolved, and it was important to stop the running of additional penalties and interest.
> 18. A copy of the check issued March 26, 2006 to the Department of Revenue for $25,000.00 is attached as Exhibit 6. This check was in payment of the amount the Department claimed for 2000 taxes, plus interest and penalties.

It is also based upon the affidavit of Mr. Jones, in which he states the following:

> 1. I am presently, and was at all past relevant times, the Controller for ABC, Inc. ("ABC") …
> 2. …
> 3. …

4. In 2006 the Department also issued a demand for the payment of additional income tax that it claimed was due. The amounts claimed were set forth in the Collections Integrated Program's Account Summary, dated February 3, 2006. This summary claimed an additional $24,332.41 was owed by ABC.
5. ABC disputed that this amount was owed and contended that it had paid all income taxes due through actual payments during the tax year and through overpayment credits from previous years.
6. A representative of the Department said that ABC's business license could be in jeopardy if the income tax matters were not resolved. For this reason, and to avoid the accrual of any additional interest and penalties, ABC paid the Department $25,000.00 on March 23, 2006. A copy of this check is attached as Exhibit B.
7. ABC assumed that the correct amount of taxes would be subsequently determined and a refund issued once it had been established that ABC had in fact overpaid its income taxes due the State.

The taxpayer bases its claim that the $25,000 it paid in 2006 constituted a tax payment with respect to its Illinois income tax liability for 2000 upon an Account Summary from the Department's Collections Integrated Program Account Summary ("Account Summary") which is attached to the Taxpayer's Response as Exhibit 5. It claims that this form constitutes an assessment for additional Illinois income tax for 2000. Taxpayer's Supplemental Response pp. 1-6. However, as noted by the Department, the taxes due indicated by the Account Summary upon which the taxpayer relies, appear to be clear on the face of this form. Specifically, the Department notes the following:

> Taxpayer stated that the $25,000 was paid to the Department in response to Account Summary dated February 3, 2006. (Taxpayer's Exhibit 5). The total statement was for $24,332.41, but Taxpayer paid the greater amount of $25,000 in order to avoid interest and penalties. (John Doe's affidavit, paragraphs 16 and 17, Taxpayer's Exhibit A). The only references to the 2000 tax year in the Account Summary were the third and fourth lines indicating in the "APE" column "2000/11" and "2000/12." Both of these lines begin, under the columns marked

> "Debt Type" and "Tax Type," with "ASM S." Taxpayer states in its Supplemental Response that according to [a Department employee] lines containing "ASM S" and the numbers "1615-2999" relate to general sales tax. Taxpayer's Supplemental Response, page 2. Consequently, the reference to the 2000 tax year in the Account Summary does not refer to Taxpayer's income tax liability; Taxpayer's claim for refund for the 2000 tax year income tax liability cannot be based upon the $25,000 payment.
> Department's Supplemental Brief in Support of Summary Judgment p. 3.

Despite the clear import of the information contained in the Account Summary, the taxpayer contends that it can produce testimony to show that this document is what the taxpayer purports it to be, namely a bill for Illinois income taxes due for 2000. Taxpayer's Supplemental Response pp. 1-6. The averments contained in Mr. Jones' affidavit and in Doe's affidavit are intended to deduce the true meaning of the Account Summary which the taxpayer received from the Department. *Id.*

As noted previously, in order for the taxpayer's averments concerning its alleged payment of 2000 income taxes in 2006 to give rise to a genuine issue of material fact, the taxpayer must show that there is competent evidence to support its claim. Ralston, *supra*. However the affidavits of Jones and Doe are insufficient to cast doubt on the plain language of the Account Summary because these affidavits are not competent.

As indicated above, in determining whether a motion for summary judgment should be granted the court may consider only averments affiants are competent to attest to. ILCS S. Ct. Rule §191(a); LaMonte, *supra*; Joseph W. O'Brien Co., *supra*; Saghin, *supra*; Boysen's Estate, *supra*; Department of Law Enforcement, *supra*; Burks Drywall, *supra*. Neither Jones nor Doe are competent to testify that the Account Summary does not say what it clearly appears to say on its face. Neither of these affiants generated this

document and neither has shown that he can competently testify to its contents as required by Supreme Court Rule 191(a), ILCS S. Ct. Rule §191(a) ("Affidavits in support of and in opposition to a motion for summary judgment …shall be made on the personal knowledge of affiants … shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness can testify competently thereto."). Their only possible basis for claiming to have any knowledge that the Account Summary was intended to bill the taxpayer for 2000 income taxes are assertions the taxpayer purports were made by a Department employee (Taxpayer's Supplemental Response pp. 2, 3) whose affidavit is not contained in the record. Testimony by either of the affiants concerning this employee's statements would be hearsay if offered at trial.

As the taxpayer admits in its Supplemental Response (p. 3), the affidavits of Jones and Doe are the only submissions proffered to support the taxpayer's claim that it paid $25,000 towards its 2000 income tax liability in 2006. Since this evidence is incompetent, there is no competent evidence in the record to support this claim. Consequently, the affidavits of Jones and Doe do not give rise to a genuine issue of material fact and therefore are insufficient to bar summary judgment in favor of the Department. Ralston, *supra*; Carruthers, *supra*.[3]

[3] The taxpayer also contends that its refund of tax overpayments for 2000 was not barred by section 911(d)(1) noted above. Taxpayer's Response p. 4. Since the facts averred in the Department's Motion support a finding that the taxpayer's refund claim was barred by section 911(d)(2) and by section 911(f), it is unnecessary to address the applicability of section 911(d)(1) to the facts averred by the Department, or the propriety of the construction of this statute asserted by the taxpayer in its response.

For the reasons set forth herein, I recommend that the Department's Motion for Summary Judgment be granted and that the Department's LTR-353, Notice of Claim Status, denying the taxpayer's refund claim for the tax year 2000 be affirmed. This order being dispositive of this case, all further proceedings in this matter are hereby cancelled.

Ted Sherrod
Administrative Law Judge

Date: March 12, 2008